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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NEW YORK STATE CORRECTIONAL
OFFICERS AND POLICE BENEVOLENT
ASSOCIATION, INC.,

Appellant,

-against-

No. 23

GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS,

Respondent.

20 Eagle Street
Albany, New York 12207
February 09, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on
2 today's calendar is number 23, Matter of New York
3 State Correctional Officers and Police Benevolent
4 Association against Governor's Office of Employee
5 Relations.

6 Counsel. Ms. Parker, would you like to
7 reserve some rebuttal time?

8 MS. PARKER: Yes, I would like to reserve
9 three minutes of my time for rebuttal.

10 CHIEF JUDGE DIFIORE: You have three
11 minutes.

12 MS. PARKER: Your Honors, good afternoon.
13 The issue before this court is whether respondents
14 acted in an arbitrary and capricious manner when they
15 denied Petitioner Tierney's out-of-title work
16 grievance. On behalf of appellants in this matter,
17 my name is Erin Parker and my arguments are set forth
18 in the brief as well as in these arguments today.

19 The appellants respectfully submit that the
20 denial of the instant out-of-title work grievance was
21 arbitrary and capricious, and respondent's
22 determination was completely irrational based on two
23 facts: the circumstances within which Petitioner
24 Tierney was assumed the duties of the Chief Safety
25 and Security Officer - - -

1 JUDGE STEIN: Why - - - why do the
2 circumstances matter? Isn't (sic) it really come
3 down to a comparison of the duties of that
4 classification compared with what he was - - - had to
5 do in the absence, regardless of what the reason for
6 the absences of his supervisor was?

7 MS. PARKER: We believe that the
8 circumstances in that he is fulfilling a permanent
9 vacancy to that position is one that is - - -

10 JUDGE STEIN: And did they know that the -
11 - - the facility was going to be closing?

12 MS. PARKER: At the time in which this
13 determination was made, it is unknown whether anyone
14 knew that the facility was closing. What they knew
15 at that point was that the Chief Safety and Security
16 Officer was leaving and had in fact left, and
17 Petitioner Tierney was specifically designated to act
18 as the Chief Safety and Security Officer.

19 JUDGE STEIN: But if we assume for the sake
20 of argument that what he did during that period of
21 time was all within the description of his duties or
22 a reasonable extension of those duties, what
23 difference does it make what the circumstances were?

24 MS. PARKER: In these circumstances, we
25 don't believe that his duties were a logical

1 extension of his Safety and Security Officer 2 duties
2 in any way.

3 JUDGE STEIN: Okay, but isn't that the
4 issue really?

5 MS. PARKER: I believe that there is case
6 law to support the fact that when you are filling in
7 in a permanent vacancy and not in a situation in
8 which you are just filling in occasionally for your
9 supervisor, that when this is a circumstance in which
10 your - - - the predecessor is not coming back, that
11 that is a permanent workplace vacancy in which you
12 are - - -

13 JUDGE STEIN: Well, what if they had hired
14 - - -

15 MS. PARKER: - - - fulfilling all of the
16 duties.

17 JUDGE STEIN: - - - somebody to fill that
18 position in exactly the same period of time, seven
19 months, and he did exactly what he did? So the fact
20 that somebody else came on would make the - - - the
21 basis for the - - - for the out-of-title work
22 different?

23 MS. PARKER: No, I don't think so, because
24 we're still talking about a significant period of
25 time, and at the time of the determination, it was

1 unknown how long that time would be. I should say at
2 the time of the appointment it was unknown how long
3 that time would be that Petitioner Tierney would be
4 fulfilling these duties. When you have a facility
5 that is specifically saying, I am designating you to
6 be the acting chief because there is no more acting
7 chief, those circumstances of a true workplace
8 vacancy make this factual determination different - -
9 -

10 JUDGE FAHEY: Well - - -

11 JUDGE PIGOTT: So your argument - - - I'm
12 sorry. Your argument is that even on day one, if he
13 - - - if he had this job for three days, that he
14 nevertheless would have been - - - would have
15 qualified for out-of-title pay?

16 MS. PARKER: I think that there is a
17 threshold time period that matters, but I think that
18 it's also consistent that this individual did last
19 for a significant amount of time because there was
20 nobody else that was brought.

21 JUDGE PIGOTT: So your - - - so your
22 argument is not that because there was no - - - there
23 was a vacancy that had to be filled. Your argument
24 is that he was there sufficiently long that he
25 qualified.

1 MS. PARKER: Sufficiently long and under
2 circumstances in which it was a vacancy to be filled.
3 I don't think that each is mutual exclusive of each
4 other. I think that they can be looked at as
5 circumstances together.

6 JUDGE ABDUS-SALAAM: So in other words, if
7 his - - - if the CSSO had been on vacation for a
8 month or had been sick or something and out on
9 disability for two or three months, your argument
10 would be different?

11 MS. PARKER: I think so, yes. And there
12 are cases that talk about that and address those
13 circumstances where courts have found that that is
14 different because there is an individual who holds
15 that position who is coming back, and when they come
16 back, can handle a lot of the long-term duties that
17 are specific to the chief position that maybe that
18 individual SSO 2 wouldn't have filled in in the
19 meantime. But - - -

20 JUDGE STEIN: But what long-term duties did
21 he fulfill here?

22 MS. PARKER: In this particular case, the
23 duty that he listed on the grievance form that were
24 more long term and not specific just to his SSO
25 duties would be sitting on the committees and on the

1 subcommittees that he notes, as well as the reports
2 that he discusses in his grievance form. Those are
3 more particular to a chief as a big-picture
4 supervisor, head supervisor of the facility, than
5 they are to the day-to-day operations.

6 JUDGE PIGOTT: Well, as I - - - as I read
7 the respondent's argument, it's as Judge Stein was
8 saying, you got - - - you got two pieces of paper,
9 one's got SSO 2 and one's got CSS, and - - - and you
10 compare the two and your client in this particular
11 case did not do anything over and above what SS 2 is
12 essentially, and they did that by comparing the
13 grievance to those two job descriptions, and - - -
14 and do you have a quarrel with that?

15 MS. PARKER: Yes, because I think that out-
16 of-context review of a short list of duties versus a
17 Civil Service classification paper comparison does
18 not take into circ - - - into consideration two key
19 facts: the fact that this was the permanent vacancy
20 that he was fulfilling for an extended period of
21 time, and, the other salient fact that I think is
22 very important here, that the agency at issue, OMH,
23 the Office of Mental Health, specifically reviewed
24 this and said yes, this individual has been appointed
25 to be the Acting Chief Safety and Security Officer,

1 we've discussed it with the facility, and we agree
2 yes, that was his role and he should be paid
3 accordingly.

4 JUDGE RIVERA: So you're saying it's just a
5 rubber stamp?

6 MS. PARKER: I apologize, your ques - - -

7 JUDGE RIVERA: Are you saying it's a rubber
8 stamp? You're say - - -

9 MS. PARKER: Civil service?

10 JUDGE RIVERA: Well, you're saying - - - it
11 sounds to me like you're saying someone else has
12 already made the call and you should just defer. Is
13 that your position?

14 MS. PARKER: I believe that what - - - our
15 concern here is that there is deference given to
16 Civil Service without any rational basis why Civil
17 Service ignored the determination of - - -

18 JUDGE RIVERA: Well - - - well, the
19 rational basis is based on - - -

20 MS. PARKER: - - - OMH.

21 JUDGE RIVERA: - - - what - - - what the
22 individual set forth in the record, so it's a
23 question of whether or not the record is sufficiently
24 complete. So could you - - - could he have moved for
25 re-argument or to reopen the record - - -

1 MS. PARKER: There - - - in this particular
2 - - -

3 JUDGE RIVERA: - - - expand the record, if
4 that's really the concern?

5 MS. PARKER: In this particular case what
6 happened was, at the OMH level, the agency said we
7 sustain the grievance, we agree. It was the agency
8 that sent it to Civil Service, which is actually
9 contrary to our collective bargaining agreement
10 provisions wherein when a grievance is sustained, it
11 is supposed to - - - if it was denied, it would be
12 appealed by the petitioners and at that point could
13 have add more information. But at the time, it was
14 just sent to Civil Service and GOER, quote for
15 payment.

16 JUDGE RIVERA: So there's no pro - - -
17 there was no procedural mechanism by which he could
18 have sought to put before the final decision maker
19 here - - -

20 MS. PARKER: More information.

21 JUDGE RIVERA: - - - more information?

22 MS. PARKER: Not in this particular case,
23 because the agency - - -

24 JUDGE RIVERA: Well, as a general matter -
25 - - let's try something else.

1 MS. PARKER: As a general matter, what
2 usually happens is if there's a denial and an appeal,
3 then we can submit more information. In this case,
4 there's no mechanism or reason to do that when the
5 agency had said yes, we agree with you, and sent it
6 to GOER specifically for monetary payment pursuant
7 with that sustained grievance.

8 JUDGE ABDUS-SALAAM: Is this the first - -
9 -

10 JUDGE RIVERA: You're saying they acted
11 beyond the scope of their authority? Is that what
12 you're arguing?

13 MS. PARKER: Has OMH?

14 JUDGE RIVERA: Yeah.

15 MS. PARKER: I believe OMH has the
16 authority to sustain agreements at a Step 2 level,
17 and they did that.

18 JUDGE RIVERA: Authority to reject - - -
19 they have the authority to reject the recommendation?

20 MS. PARKER: The Civil Service? I don't
21 think Civil Service, upon the time in which they
22 actually reviewed it, should have even had it in
23 front of them for review. They should have just had
24 it in front of them for payment, because there was no
25 actual appeal. Based on the facts in front of us and

1 the record and the dates, you can see that Civil
2 Service actually made their determination before
3 NYSCOPBA and Petitioner Tierney actually appealed the
4 case to the GOER and Civil Service level.

5 JUDGE STEIN: At - - - at that level, when
6 they appealed the case, why couldn't they have asked
7 to submit more proof?

8 MS. PARKER: Well, for them, there was no
9 particular reason to need to submit more proof
10 because the agency had sustained the grievance.
11 There was an expectation that it was going to get
12 paid.

13 JUDGE ABDUS-SALAAM: Did the agency's
14 determination go before GOER in toto? In other
15 words, did the agency put in its determination the
16 various duties that Mr. Tierney was performing that
17 he had not listed on the grievance form?

18 MS. PARKER: The only information we have
19 in the record about what OMH sent to Civil Service
20 and GOER is their Step 2 answer, and their Step 2
21 answer discusses the items that he referenced in his
22 grievance form as well as specifically mentioned that
23 they discussed the issue with the facility
24 management, and I think that's a very key fact
25 because that is important to show that OMH was taking

1 their due diligence and their time to go talk to the
2 facility and say, do you agree that this individual
3 is performing not only these duties, but acting as
4 the Chief Safety and Security Officer.

5 JUDGE PIGOTT: What - - - what are we - - -
6 at least I'm - - - missing that you would appeal a
7 decision you won?

8 MS. PARKER: Well, the - - - the
9 circumstances were that we knew it had been sent to
10 Civil Service based on the letter, and as you can see
11 from the affidavit of our grievance coordinator
12 contained in the record, he actually called OMH and
13 said, why did you send this to Civil Service, and
14 they said because they have to pay it. And then once
15 we received the Step 2 answer, our only option at
16 that point without money in hand yet is to then
17 appeal it to Civil Service.

18 JUDGE PIGOTT: Well, couldn't you begin an
19 Article 78? I - - - I would think, you know - - -

20 MS. PARKER: Not at that point, because you
21 haven't gone all the way through the steps that are
22 consistent with the collective bargaining agreement.

23 JUDGE STEIN: So was there a Step 3 that
24 followed?

25 MS. PARKER: The Step 3 is the Civil

1 Service review which is signed off on by GOER.

2 JUDGE STEIN: Okay, so there - - - there
3 was no - - - there was nothing in between. I'm still
4 trying to pursue whether there was an option to say,
5 you know, if - - - if you're reviewing this, then we
6 want you to look at some additional information.

7 MS. PARKER: There was nothing in between.
8 It goes from the Step 2 answer by the agency and this
9 case went right to Civil Service. And the Step 3,
10 for what it's worth, is literally the GOER letter on
11 top of the Civil Service determination.

12 CHIEF JUDGE DIFIORE: Thank you, Ms.
13 Parker.

14 MS. PARKER: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel.

16 MS. ETLINGER: Good afternoon, Your Honors.
17 May it please the court, Laura Etlinger for the
18 State-respondents. This is a very factual based
19 inquiry and what happened here is that the Division
20 of Classification and Compensation, as it's directed
21 to under the statutes, conducted a close comparison
22 of the grieved duties and the duties specified in the
23 classification standards for both positions.

24 JUDGE ABDUS-SALAAM: So basically, Ms.
25 Etlinger, the - - - the two agencies took a look at

1 what was listed in the grievance and what the duties
2 of the job were, and that's what happened with the
3 other agency where the determination was made the day
4 later from OPWDD, a similar situation?

5 MS. ETLINGER: Yes.

6 JUDGE ABDUS-SALAAM: So in other words, it
7 sounds like had Mr. Tierney put more information in
8 the grievance, he - - - his grievance might have been
9 sustained by DCC and - - -

10 MS. ETLINGER: If - - -

11 JUDGE ABDUS-SALAAM: - - - GOER?

12 MS. ETLINGER: If he had been performing
13 additional duties. The agen - - -

14 JUDGE PIGOTT: Well, how about this how
15 about the fact that you couldn't have a Step 1
16 because he was in the job of Chief Security and
17 Safety Officer, and he - - - and because of that, he
18 couldn't review himself?

19 MS. ETLINGER: Normally the Step 1 is
20 performed by the head of the facility.

21 JUDGE PIGOTT: Exactly. Well, no - - -
22 well, my point is that in this particular case, they
23 said, he's working out of title and so he can't
24 supervise himself and - - - and say yeah, I'm working
25 out of title. So it - - - it almost seemed - - -

1 MS. ETLINGER: But - - -

2 JUDGE PIGOTT: - - - tautological to me
3 that that didn't show up in anybody's analysis.

4 JUDGE FAHEY: To - - - to follow up on
5 that, too, it's the Williams case that we're talking
6 about here?

7 MS. ETLINGER: Yes.

8 JUDGE FAHEY: There seemed to be a gotcha
9 element to this thing, where in Williams, there was
10 more detail - - - you're right about that - - - but
11 the process followed wasn't exactly the same, and if
12 it's just a comparison of job descriptions and not of
13 duties, then I - - - I don't understand how she wins
14 and he doesn't, but if it's an actual comparison
15 between what was said in the grievance form between
16 the two parties and he didn't have the first step
17 review, how do we end up here?

18 MS. ETLINGER: Well, I'm not sure how the
19 Step 1 review would have helped him. He filled out a
20 form and it said, list all your duties that you're
21 performing as Acting Chief Safety and Security
22 Officer, and he put down the duties he was
23 performing. Those duties were per - - - were
24 reviewed by his employer agency. They may have
25 conducted additional fact-finding. In fact, that's

1 an - - - an appropriate role for the employer and why
2 the Step 2 review is important. The employer can
3 conduct an investigation and determine whether, as
4 OMH did here, are you actually performing the duties
5 you've listed on your grievance?

6 JUDGE FAHEY: Well, he thought he was,
7 right?

8 MS. ETLINGER: I'm sorry?

9 JUDGE FAHEY: He thought he was.

10 MS. ETLINGER: He was performing those
11 duties, and they reached - - -

12 JUDGE ABDUS-SALAAM: Well, it sounds like
13 they thought he was performing more duties - - -

14 JUDGE FAHEY: Supervisory duties.

15 JUDGE ABDUS-SALAAM: - - - than what he
16 listed in - - - in the grievance form.

17 MS. ETLINGER: Well, they didn't make any
18 factual findings in their determination that he was
19 performing any additional duties.

20 JUDGE PIGOTT: That - - - that's getting
21 back to what - - - what Judge Fahey's saying; I mean,
22 it just seems like a really technical thing. If - -
23 - if - - - I don't know what the union was - - - it's
24 obviously the union that was filling out one of them,
25 but if - - - if an employee fills out his own and - -

1 - and doesn't fill it out completely, I would think
2 that the employer would say, you know, even though
3 you didn't put in here that you're supervising
4 discipline, that's one thing we know and therefore we
5 think you are working out of title.

6 MS. ETLINGER: But there's no evidence on
7 this record.

8 JUDGE PIGOTT: And - - -

9 MS. ETLINGER: I'm sorry, Judge.

10 JUDGE PIGOTT: That's okay. And - - - and
11 if, as a - - - as a requirement of our facility, we
12 must have a Chief Safety and Security Officer,
13 otherwise we're working - - - you know, we're in
14 violation of - - - of our own Mental Health Law,
15 therefore you're it, whether he's sleeping on the job
16 or not it would seem to me that he's - - - that's a
17 critical position that has to be filled by OMH, and
18 they seem to be satisfied that he was doing it. And
19 now someone comes in with a static opinion that says
20 regardless of what was going on in the facility,
21 regardless of what he was doing, because on this
22 piece of paper he didn't fill out things that he
23 probably could have filled out, we're not going to
24 give him the mon - - - the money that he probably
25 deserves.

1 MS. ETLINGER: Well - - -

2 JUDGE PIGOTT: That's the way I was looking
3 at it.

4 MS. ETLINGER: Well, a couple of things.
5 First of all, the circumstances are important here,
6 and what was important on this record is that the
7 facility was in the process of winding down, and the
8 parties would have had notice of this because OMH is
9 required, pursuant to Mental Hygiene Law 7.17(e)3, to
10 provide twelve months' notice before they close a
11 facility, and specifically must notify the union that
12 they're closing the facility.

13 So employees have notification that the
14 facility is closing. OMH knew that they were winding
15 down the facility. They could have reasonably
16 determined that in the winding down period, they
17 didn't need the long-range planning duties performed.

18 JUDGE STEIN: Do we - - - do we know from
19 this record whether anybody, including the petitioner
20 here, was performing those duties?

21 MS. ETLINGER: Well, we know from what's
22 listed on the grievance, and that's what everybody
23 had to go by. If OMH conducted an investigation and
24 found additional facts, they needed to put those
25 facts forth somewhere so that the reviewing agency

1 knew what duties to compare to the classification
2 standards.

3 JUDGE RIVERA: She says he got - - - that
4 he had no opportunity to expand the record or put
5 forward information.

6 MS. ETLINGER: We disagree with that.

7 JUDGE RIVERA: Okay, well, explain why.

8 MS. ETLINGER: There was a confusion in the
9 process that occurred here. The employer sent its
10 Step 2 decision directly to the Division of - - -
11 Division of Classification and Compensation before
12 the union put in an appeal. But ultimately the union
13 did appeal, and if you look at page 83 of the record,
14 you'll see that they appealed not only this case but
15 three others as well, and they did not put any
16 additional facts in any of those. Now, it's a little
17 - - -

18 JUDGE RIVERA: But she said they - - - they
19 had no reason to.

20 MS. ETLINGER: Well, but you're right.
21 They had no reason to.

22 JUDGE RIVERA: They send the
23 recommendation.

24 MS. ETLINGER: But that is the agreement
25 here that all the parties operate under. Under the

1 collective bargaining agreement, there is always a
2 Step 3 determination. It is not the employer who
3 makes the final determination, so the sophisticating
4 bargaining representative knew, if they had any
5 additional facts they wanted GOER to consider - - -

6 JUDGE RIVERA: Is what happened here an
7 aberration; is this a unique case?

8 MS. ETLINGER: Well, it - - - it was
9 unusual that the record went to Division of
10 Classification and Compensation first, but it
11 nonetheless ultimately was appealed, and when it was
12 appealed, as the petitioners recognize, it was sent
13 back to Classification and Compensation, so any
14 additional facts could have been reviewed at that
15 point.

16 JUDGE PIGOTT: Could you - - - could you
17 help me out on that? As I understand it with the way
18 your argument is going, the employer says he's
19 working out of title, he deserves to be paid. The union
20 says he's working out of title, he deserves to be
21 paid. Everybody agrees he's working out of title and
22 deserves to be paid. You have to send it to GOER to
23 get paid.

24 MS. ETLINGER: You have to send it - - -

25 JUDGE PIGOTT: You send it to GOER to get

1 paid, and somebody - - - not a party to the action -
2 - - says both of you are wrong; you employer and you
3 employee are wrong and he does not deserve to be
4 paid. Shouldn't it get remitted for that reason?

5 I mean, I don't - - - I - - - I get the
6 paperwork. You know, you didn't - - - you didn't do
7 your homework so you don't get an A, but either he
8 did it or he didn't and to say it's insufficient when
9 everybody that's involved in it, employer and
10 employee alike, say he did do this work, shouldn't we
11 at least send it back for a fact-finding?

12 MS. ETLINGER: I don't think so, because I
13 think what OMH did was reach a different legal
14 conclusion on the same facts, and that legal
15 conclusion, if there's going to be deference, would
16 be given to the agency with administrative expertise
17 in determining whether something is out of title.

18 JUDGE PIGOTT: But for example, you didn't
19 - - - you didn't note in - - - in denying this that
20 he was in charge of discipline - - - he was in charge
21 of determining whether or not employees were working
22 out of title. We know that he was in charge of that
23 because he couldn't hear his own. So that meant that
24 if that - - - if that trainee they had was working
25 out of title because he had moved up, and that

1 trainee said I want to be paid SS 2 because I'm no
2 longer an SS 1 or I'm no longer a trainee, he would
3 make that determination. That would be his job as
4 the Chief of Safety and Security.

5 MS. ETLINGER: That's what they submit,
6 yes.

7 JUDGE PIGOTT: And yet that was not part of
8 the - - - of the equation that - - - that DCC said to
9 GOER.

10 MS. ETLINGER: No, because he had a full
11 review at Step 2 and Step 3.

12 JUDGE PIGOTT: No, because it wasn't on the
13 paperwork. That was your argument, because at Step
14 2, OMH said yes, you're working out of title.

15 MS. ETLINGER: But Step - - - but OMH was
16 looking at the same facts.

17 JUDGE PIGOTT: Facts.

18 MS. ETLINGER: The same - - - the same
19 facts. There were no different facts - - -

20 JUDGE PIGOTT: Do - - - do you understand
21 what I'm saying?

22 MS. ETLINGER: Yeah, I - - - actually, I
23 apologize, Your Honor.

24 JUDGE PIGOTT: In other words - - - in
25 other words, Mr. Tierney did not say, I'm in charge

1 of determining discipline; I'm in charge of
2 determining whether people are working out of title.
3 And he was, and we know that because he couldn't hear
4 his own case, but that wasn't in his paperwork and it
5 wasn't in DCC's paperwork to say he was or wasn't
6 working out of title. So there's facts there that
7 were, it seemed to me, apparent on its face that
8 didn't get - - - didn't get worked into the equation
9 and I'm wondering, you know, why that would be.

10 MS. ETLINGER: Well, he submitted that he
11 was the one who would have reviewed it. If you read
12 the collective bargaining agreement, it's actually
13 the head of the facility, not the head of the
14 department, who reviews - - -

15 JUDGE PIGOTT: But that wasn't in your
16 paperwork either.

17 MS. ETLINGER: Well - - -

18 JUDGE PIGOTT: You didn't - - - you didn't
19 say that.

20 MS. ETLINGER: It's in the collective
21 bargaining agreement.

22 JUDGE PIGOTT: No, but you didn't say that
23 - - -

24 MS. ETLINGER: Okay.

25 JUDGE PIGOTT: - - - in saying he didn't -

1 - - he didn't work. So you want to say his paperwork
2 is insufficient, therefore he doesn't get paid. He
3 wants to say I should get paid because OMH knows that
4 I was, and - - - and it seemed to me if you have an
5 argument, you have to put in your paperwork the
6 reasons why you don't - - -

7 MS. ETLINGER: So you're saying because he
8 reviewed - - - because he maintains he was in a
9 position to review the out-of-title grievances, that
10 was - - -

11 JUDGE PIGOTT: I'm say - - - I'm saying
12 that. It occurred to me when I was reading this; I
13 thought how much more out of title can you be if
14 you're the one that's supervising out-of-title work?

15 MS. ETLINGER: Well, I think what we would
16 say is that on this record, OMH did not find any
17 additional facts.

18 JUDGE PIGOTT: Um-hum.

19 MS. ETLINGER: And looking at those facts,
20 they made a legal conclusion and the Division of
21 Classification and Compensation and GOER made a
22 different legal conclusion based on those facts.

23 JUDGE RIVERA: The - - - the acting title
24 and actual title under the collective - - -

25 MS. ETLINGER: There's no title.

1 JUDGE RIVERA: - - - bargaining - - -
2 there's no such title.

3 MS. ETLINGER: There's no such title. And
4 - - -

5 JUDGE RIVERA: And it's possible to deploy
6 these various responsibilities across several people;
7 is that correct?

8 MS. ETLINGER: Well, not only that, if you
9 look - - -

10 JUDGE RIVERA: Well, no, is that a yes?

11 MS. ETLINGER: Yes, it is possible to do
12 them over several people.

13 JUDGE RIVERA: Okay. So what - - - what
14 are the facts though - - -

15 MS. ETLINGER: The - - - the - - -

16 JUDGE RIVERA: - - - that you were
17 referring to that you say are the facts that
18 everybody looked at except they came up with a
19 different legal conclusion?

20 MS. ETLINGER: He oversaw day-to-day
21 operations.

22 JUDGE RIVERA: And - - - and are those
23 facts that are only on the grievance?

24 MS. ETLINGER: Yes, these are facts that
25 are only - - - that are on the grievance.

1 JUDGE RIVERA: Set forth in his grievance.

2 MS. ETLINGER: Yes, he - - - on record page
3 57, he oversaw day-to-day operations, he supervised
4 two Safety and Security Officers 1 and a trainee - -
5 -

6 JUDGE STEIN: So you're saying that because
7 OMH never actually found that he was doing any more
8 than what he said in his grievance - - -

9 MS. ETLINGER: Exactly.

10 JUDGE STEIN: - - - that's what the record
11 shows, that on those same facts that - - - that
12 eventually GOER looked at, they said that's out-of-
13 title work; GOER said that's not out of title.

14 MS. ETLINGER: That's not. They reached a
15 different legal conclusion. And I think it's also
16 important that a Safety and Security Officer 2 can be
17 in charge of a facility safety force of less than ten
18 Safety and Security Officers 1.

19 JUDGE ABDUS-SALAAM: What - - -

20 MS. ETLINGER: And that's in the - - -

21 JUDGE ABDUS-SALAAM: I'm sorry, counsel.
22 What - - - what weight or credence should be given to
23 OMH saying we went to the facility, we talked to
24 people, and it appeared to me that they weren't just
25 confirming that he did what he - - - what Mr. Tierney

1 said on his grievance form, but that he was
2 performing other duties that suggested that he was
3 actually the CSSO, but they didn't write it down.

4 MS. ETLINGER: Well - - -

5 JUDGE ABDUS-SALAAM: They didn't make a
6 separate determination, factual determination, you're
7 saying.

8 MS. ETLINGER: Although if you look at
9 their decision, they say you maintain you were
10 performing X, Y, and Z; we agree that you were
11 performing X, Y, and Z. So I think they went further
12 than just not discussing the issue of what duties he
13 was performing. They actually confirmed that he was
14 performing the duties listed on his grievance.

15 JUDGE ABDUS-SALAAM: And based on that
16 confirmation, they felt he was working out of title -
17 - -

18 MS. ETLINGER: Yes.

19 JUDGE ABDUS-SALAAM: - - - but GOER and DCC
20 said no, that's not working out of title.

21 MS. ETLINGER: Those duties are not out of
22 title. I think these are really just two different
23 legal conclusions.

24 JUDGE RIVERA: So - - - so if we agree with
25 you, is he permanently foreclosed? He can never - -

1 - he can't now - - - is there some - - - let me ask
2 it this way is there another pathway under the
3 collective bargaining agreement for him to now
4 perhaps present a - - - a better record for
5 consideration, or is he completely foreclosed if we
6 hold in your favor?

7 MS. ETLINGER: I think the problem is the
8 timing.

9 JUDGE RIVERA: Um-hum.

10 MS. ETLINGER: Because the payment - - - I
11 believe the payment is made fifteen days - - -

12 JUDGE RIVERA: I see.

13 MS. ETLINGER: - - - before your
14 application, so you have to do it promptly, and he
15 did it promptly here, but the duties he took on - - -
16 we're not disputing that he may have taken on
17 additional duties and he may have been - - - they may
18 have had a Chief Safety and Security Officer who
19 wasn't doing anything more than a Safety and Security
20 Officer 2 was doing, or the Chief Safety and Security
21 Officer could have been performing those supervisory
22 functions as well as others that were no longer
23 needed while the facility was winding down.

24 JUDGE PIGOTT: You're just saying on - - -
25 on the paper, on - - - on the - - - comparing the two

1 - - -

2 MS. ETLINGER: Yes, and because they had an
3 opportunity to submit additional facts if they wanted
4 to. They did appeal.

5 JUDGE PIGOTT: And when you say "they",
6 you're talking about the union?

7 MS. ETLINGER: The union. The union
8 appealed.

9 JUDGE PIGOTT: They - - - your opponent
10 makes the point that they won. So how do you - - -
11 how do you file a brief - - -

12 MS. ETLINGER: Well - - -

13 JUDGE PIGOTT: - - - that says we won, but
14 we want to add stuff?

15 MS. ETLINGER: Because they knew that it
16 was going to be reviewed by the Division of
17 Classification and Compensation and GOER, and if they
18 wanted anything additional, they needed to put it in
19 at that point.

20 JUDGE PIGOTT: They put - - -

21 JUDGE RIVERA: You said they took the risk
22 that the grievance - - -

23 MS. ETLINGER: They took the risk.

24 JUDGE RIVERA: - - - was insufficient. Was
25 there - - - was there some - - - was there some

1 history that might have put the union or this
2 petitioner on notice that perhaps this kind of a
3 grievance would be insufficient? Were there other
4 decisions?

5 MS. ETLINGER: I'm not - - -

6 JUDGE RIVERA: The union obviously might be
7 more aware of it.

8 MS. ETLINGER: I'm not aware of any.

9 JUDGE RIVERA: Okay, all right. Thank you.

10 MS. ETLINGER: Thank you.

11 MS. PARKER: Just a couple of points on
12 your - - -

13 JUDGE RIVERA: Forever foreclosed?

14 MS. PARKER: Yes. Yes, we are forever
15 foreclosed.

16 JUDGE RIVERA: Yes, it is.

17 MS. PARKER: With respect to the
18 requirements of timeliness of filing of grievances
19 including out-of-title grievances, we would
20 absolutely be foreclosed. Furthermore, the union did
21 not know that Civil Service would review the case on
22 its merits. All we were told by the determination of
23 the agency level of OMH was that it was being sent to
24 Civil Service for monetary relief.

25 JUDGE RIVERA: She says that's in

1 accordance with the CBA.

2 MS. PARKER: No, actually - - -

3 JUDGE RIVERA: The union should know that
4 that's the practice; is that not true?

5 MS. PARKER: It's - - - it is not the
6 practice for OMH to send it directly to Civil Service
7 and GOER.

8 JUDGE RIVERA: Putting aside how it got
9 there, the question is the authority of - - - of the
10 ultimate decision maker here.

11 MS. PARKER: Well, the authority - - -

12 JUDGE RIVERA: Is it - - - are you saying
13 that under the - - - the CBA, that's not the
14 authority?

15 MS. PARKER: Eventually if you're denied at
16 the Step 2 level, then there is an appeal to Step 3
17 which is GOER and Civil Service. But in this
18 particular case, we weren't denied at the Step 2
19 level and Civil Service and GOER receives the case.

20 JUDGE RIVERA: You're saying the CBA
21 doesn't give plenary review?

22 MS. PARKER: No.

23 JUDGE RIVERA: It only - - - it only gives
24 authority if there's a denial; is that what you're
25 saying?

1 MS. PARKER: To appeal? There would be no
2 reason to appeal without a denial.

3 JUDGE RIVERA: That's what I'm saying.

4 JUDGE STEIN: What would be the next step
5 if they hadn't sent it up? What would have happened
6 after the decision was in favor of - - - of the
7 petitioner?

8 MS. PARKER: We argue it was a sustained
9 grievance and it was being sent to Civil Service
10 simply for payment.

11 JUDGE STEIN: No, no, but what would - - -
12 is that what would have happened ordinarily?

13 MS. PARKER: Ordinarily - - - well, in
14 particular in Ms. Williams' case, her - - - hers was
15 - - -

16 JUDGE STEIN: No, no.

17 MS. PARKER: - - - hers was paid.

18 JUDGE STEIN: No, no. This - - - this
19 gentleman files, he takes his Step 2 because he
20 bypasses Step 1, he gets a determination in his
21 favor.

22 MS. PARKER: Um-hum.

23 JUDGE STEIN: Then what would ordinarily
24 happen next?

25 MS. PARKER: It's a sustained grievance.

1 It would get paid.

2 JUDGE GARCIA: The - - - the agency can
3 appeal, OMH could not - - - OMH is not a - - -

4 MS. PARKER: There is not a mechanism for
5 the employer to appeal, if that's what you're asking.

6 JUDGE GARCIA: Right.

7 MS. PARKER: No.

8 JUDGE STEIN: My other question is, is so
9 you're going before the agency in the first instance,
10 you're making, I would assume, your - - - your best
11 pitch, because you want to get this out-of-title pay.

12 MS. PARKER: Um-hum.

13 JUDGE STEIN: What - - - what would - - -
14 why would he not put in everything that he was doing
15 to make his best pitch in the first instance,
16 regardless of whether he has a chance later on?

17 MS. PARKER: Yeah, I - - - I understand
18 your concern, but I believe in this particular case
19 you're dealing with an individual who the facility
20 agreed from the get-go was absolutely performing the
21 duties of an Acting Chief Safety and Security
22 Officer. So you're dealing with an individual, not
23 the union at that point, who's - - - the individual
24 may not be as union-savvy and grievance-savvy who has
25 two lines on a form to write these duties down.

1 JUDGE PIGOTT: If that was true, he
2 wouldn't have had to file a grievance. He could have
3 gone into the office and said I should be paid as the
4 Chief Security Officer, and they said fine, well,
5 here's the paperwork, sign it.

6 MS. PARKER: And - - - and I think, quite
7 frankly, at - - - had there been a Step 1, there
8 would have been time at that point and an employer
9 indicating look, you might want to fill more of this
10 out.

11 JUDGE RIVERA: Well, is there any obstacle
12 for him to approach the union before filing this
13 grievance?

14 MS. PARKER: No.

15 JUDGE PIGOTT: Before you - - - before you
16 leave - - -

17 MS. PARKER: Yes.

18 JUDGE PIGOTT: - - - because your white
19 light's on, in your Article 78, and - - - and this
20 was pointed out by your respondent, your - - - your
21 wherefore clause, you want - - - you want to declare
22 the respondent - - - the respondent's denial
23 arbitrary and capricious, and you want a remand of
24 the grievance to GOER for redetermination and finding
25 that the petitioner performed out-of-title work,

1 right?

2 MS. PARKER: That is what was requested. I
3 think the court also has the ability to grant the
4 relief that is ultimately requested, which is to
5 determine that the grievant was working out of title.

6 JUDGE PIGOTT: But if we were - - - if we
7 were unsatisfied with the way the record is, do we
8 have the authority, in your view, to remand it?

9 MS. PARKER: I believe you could remand it
10 with an opportunity for the individual to further
11 substantiate the record.

12 JUDGE PIGOTT: I was going to say, I hope
13 you said no. I was curious.

14 CHIEF JUDGE DIFIORE: Thank you, Ms.
15 Parker.

16 (Court is adjourned)

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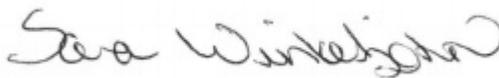
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York State Correctional Officers and Police Benevolent Association, Inc. v. Governor's Office of Employee Relations, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: February 10, 2016